

STATE OF RHODE ISLAND  
AND  
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

G. DOE

V.

NORTH KINGSTOWN SCHOOL DEPARTMENT

### DECISION

Held: There is evidence that North Kingstown failed to provide the accommodations required by this student's May 27, 2009 Section 504 Plan consistently and therefore failed to comply with the Interim Order issued by the Commissioner on June 3, 2010. However, the Petitioner waived his right to a remedy in this proceeding because he failed to provide effective notice to the district as to how the 504 Plan was not being followed at that time and failed to seek enforcement of the Interim Order in Superior Court.

The Petitioner has not proven that the district failed to comply with the 504 Plan developed on January 14, 2011, but there is evidence of a lack of clarity and confusion as to what the Plan requires. The evidence also establishes that the January 14, 2011 Plan does not adequately address Student Doe's needs. The inadequacy of the current 504 Plan and the lack of clarity with respect to some of its provisions require that the Plan be revised as soon as possible. A 504 Plan that clearly describes academic supports and services necessary for Student Doe to receive a free appropriate public education must be in place no later than October 24, 2011.

A special visitor is appointed to assist the district in developing a 504 Plan that meets these requirements and the Commissioner's jurisdiction over this matter is retained.

DATE: October 4, 2011

## **Travel of the Case:**

A dispute has existed between Student Doe's parents and the North Kingstown School District since at least the beginning of the 2009-2010 school year. Student Doe entered North Kingstown High School in September of 2009 as a freshman and 504-eligible student. Implementation of his Section 504 Plan (developed on May 27, 2009 at the close of eighth grade) at North Kingstown High School was contentious throughout Student Doe's freshman year. In April of 2010, the district notified his parents that it was reconsidering Student Doe's eligibility for a 504 Plan based on its position that he did not have a qualifying disability. On April 7, 2010 his parents filed a request for hearing with the Commissioner. Hearings were held on multiple dates. The Commissioner entered an Interim Order on June 3, 2010 requiring the district to maintain the May 27, 2009 Section 504 Plan in effect pending a final decision.

The Commissioner issued a final decision on December 23, 2010. She found that North Kingstown had violated Section 504 by failing to consistently follow portions of Student Doe's May 27, 2009 Accommodation Plan. The December 23, 2010 decision also confirmed that Student Doe remained eligible for Section 504 supports and services. The parties were directed to "revisit the schoolwork and study strategies contained in the April 2009 neuropsychological evaluation".

After issuance of the Commissioner's decision, a meeting was convened on January 14, 2011 and a revised Plan was developed for Student Doe. Since the very inception of this Accommodation Plan the Petitioner and district have disagreed on whether it meets Student Doe's needs. The Petitioner has asserted that the 504 Plan is inadequate because district officials have refused to incorporate revised language and include two additional modifications suggested by Student Doe's evaluating neuropsychologist. Since at least early March of this year there have been issues as to how the provisions of the Accommodation Plan should be interpreted. According to his interpretation of the provisions in the Plan, the Petitioner asserts that his son does not receive all of the accommodations to which he is entitled. The Petitioner also contends that North Kingstown has no local grievance procedure in place to resolve 504 issues such as those he wishes to present. He has written to the Superintendent and members of the North Kingstown School Committee to request that they become involved, but instead he has been referred to the complaint process of the Office of Civil Rights or to RIDE's hearing process.

On May 20, 2011 the Commissioner received a request for a second hearing. According to the letter of appeal, since the closing of the record in the first appeal, the following issues have arisen:

- During the time period September 1, 2010 through January 14, 2011,<sup>1</sup> the District failed to provide (Student Doe) with all of the accommodations in his "stay put" May 27, 2009 Accommodation Plan as was required by the June 3, 2010 Interim Order.
- The current (January 14, 2011) 504 Plan does not adequately meet the needs of Student Doe and therefore he is not receiving a free appropriate public education at North Kingstown High School.

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<sup>1</sup> Student Doe's father corrected the period of alleged non-compliance with the June 3, 2010 Interim Order at the time of the hearing. See Transcript June 28, 2011 at pages 76-78.

- From January 14, 2011 through June 28, 2011, the district failed to consistently provide the accommodations in Student Doe’s 504 Plan.
- The North Kingstown School Department has no internal grievance procedure to address 504 disputes.

On May 31, 2011 the undersigned was designated to hear and decide this second appeal to the Commissioner. The matter was heard and testimony and documentary evidence was taken on June 28, 2011 and on August 25, 2011. The record in this case closed on September 19, 2011. The decision in this matter has been expedited.

Jurisdiction to hear this matter arises under R.I.G.L. 42-87-5(c) and 16-39-1.

### **Findings of Relevant Facts:**<sup>2</sup>

- On January 14, 2011 a Section 504 meeting regarding Student Doe was held pursuant to the Commissioner’s December 23, 2010 decision.<sup>3</sup> At that meeting the 504 team considered documentation of Student Doe’s disability, a description of his academic needs and the recommendations contained in the April 13, 2009 report of Diane Whipple, Ph.D. Pet. Ex.2 and 15; S.C. Ex. A.
- At its January 14, 2011 meeting, the Section 504 team indicated that it found<sup>4</sup> that Student Doe has a disability<sup>5</sup> that substantially limits one or more major life activities, i.e. learning, and that it impacts on his ability to receive equal access and benefit from school programs and services. Pet. Ex. 2 and 15.
- The Section 504 meeting documentation ultimately identified four areas of concern:
  - Math concepts and computation;
  - Organization;
  - Memory and retention of information;
  - Length of time needed to complete homework assignments (see page 3 of Pet. Ex.2 and 15).
- The Section 504 team reviewed Student Doe’s standardized test scores and his grades before putting together a revised Section 504 Accommodation Plan on January 14, 2011. Pet. Ex. 2 and 15.

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<sup>2</sup> Because we find that the Petitioner waived his right to a remedy for any noncompliance with the May 27, 2009 Section 504 Plan (as explained later in this decision) there are no factual findings with respect to any specific violations of that 504 Plan.

<sup>3</sup> It should be noted that the December 23, 2010 decision “urged” (but did not require or direct) the parties to “revisit the schoolwork and study strategies contained in the April 2009 neuropsychological evaluation”. (decision at page 13)

<sup>4</sup> The Commissioner’s December 23, 2010 decision contained a ruling that Student Doe “remains eligible for Section 504 coverage”.

<sup>5</sup> As a result of her psychological evaluation of Student Doe, Dr. Whipple had concluded that he suffers from “Executive Function Disorder” affecting memory, initiating tasks, planning, and organizing materials.

- In an email dated January 30, 2011, the Petitioner requested revisions to some of the language in the January 14, 2011 Accommodation Plan and the addition of two more testing accommodations.<sup>6</sup> The district agreed to add “memory and retention of information” as a concern addressed by Student Doe’s 504 Plan and agreed to make a minor revision to Accommodation #9. The other requested revisions and additional accommodations were rejected. Pet. Ex. 2, 3, 14 and 15.
- In an email to Superintendent Philip Thornton and members of the North Kingstown School Committee dated March 5, 2011, the Petitioner stated “... (Student Doe) is not receiving all of the accommodations called for in the plan”. (Pet. Ex. 11).
- Student Doe testified that he did not consistently receive all of the accommodations called for in his January 14, 2011 Section 504 Plan. Tr. pp. 86-102.
- The 504 Coordinator at North Kingstown High School testified that no teachers expressed any concerns or had any questions about Student Doe’s revised 504 Plan, and she received no complaints from either Student Doe or his father that the Plan was not being followed. Tr. p. 172.
- There is evidence that Student Doe’s teachers were unclear about how Accommodation #10 was to work, exactly what information was to be provided to Student Doe, in what form, and whether the information and materials provided to all students in the class before a test was sufficient. Pet. Ex. 16.
- In an email dated March 5, 2011, the Petitioner requested that the Superintendent and members of the School Committee meet with him to resolve the need to make further revisions to his son’s 504 Plan, to act on his request to change his son’s grades for the first semester, and to hear his complaint that his son was not currently receiving all of the accommodations called for in his 504 Plan. Pet. Ex. 11.
- Counsel for the district replied to the Petitioner in writing on April 13, 2011. She implicitly denied his request that the Superintendent and members of the School Committee meet with him to resolve pending issues. She referred the Petitioner to either RIDE or the Office of Civil Rights for the processing of his complaint that his son was not receiving the benefits of an appropriate 504 Accommodation Plan. Pet. Ex. 11.
- In her April 13, 2011 letter, counsel also indicated that every one of Student Doe’s teachers had been contacted, that they had indicated they understood how the accommodations were to be implemented and that they were following his revised 504 Plan. She reiterated the district’s position that the current 504 Plan met Student Doe’s needs. Pet. Ex. 11.

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<sup>6</sup> The revisions and additional accommodations had been suggested by Dr. Whipple, who had not been able to attend the meeting of the 504 team on January 14, 2011.

- In her letter of April 13, 2011 counsel for the district rejected the request to change Student Doe's first semester grades.<sup>7</sup> The reason provided in that letter was that when the Petitioner had lodged a general complaint that the Interim Order was not being followed, he had been asked on November 23, 2010 to "be specific as to how you feel it is not being followed". The Petitioner refused to provide specific information at that time. He indicated that he had no complaints with the teachers but rather with school administrators' interpretation of the Plan. He also wrote that "it would not be appropriate for me to discuss these matters with the teachers. Only (the hearing officer's) decision can clear this up for us all". Pet. Ex. 11 (which includes an exchange of emails between the Petitioner and counsel for the district dated November 23, 2010).
- On May 6, 2011 the Petitioner emailed Superintendent Thornton regarding conversations he stated he had had with the Office of Civil Rights. He expressed his concern that a "significant distraction to the general education of all students in North Kingstown" would result from a "thorough investigation" involving each and every one of Student Doe's teachers. He again requested a meeting so that "we can all sit down and try to reach an agreement amongst ourselves". Superintendent Thornton responded by emailing the Petitioner that he should proceed with OCR and that the district would cooperate with all OCR requests. Pet. Ex. 12.

### **Positions of the Parties:**

#### **The Petitioner:**

##### **Compliance with the June 3, 2010 Interim Order:**

The Petitioner obtained an Interim Order on June 3, 2010 mandating that his son's May 27, 2009 Accommodation Plan "remain in effect pending the hearing and resolution of the complaint" he had filed with the Commissioner. Among the findings and conclusions contained in the Commissioner's decision of December 23, 2010 was that Student Doe remained eligible for a 504 Plan. Although the decision encouraged the parties to review the existing plan and to "revisit" some of the recommendations contained in Dr. Whipple's 2009 evaluation, the decision implicitly required the district to continue to implement the May 27, 2009 Section 504 Plan pending any revision. The Petitioner contends that his son's testimony clearly establishes that from September 1, 2010 until January 14, 2011, he was not provided with all of the accommodations to which his 504 Plan entitled him.

He testified that, with the exception of one teacher, he was not provided with strategies to aid his memory for use in test preparation and test taking. Student Doe testified that he did not receive copies of teacher notes. Teachers did not help him get started on tasks and tests, failed to provide him with step by step instructions for tests and assignments or confer with him frequently regarding assignment expectations and ongoing progress of long-term projects. With the exception of

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<sup>7</sup> The Petitioner had made this same request at the January 14, 2011 meeting at which time it was also rejected. His request was based on his assertion that his son had not been provided with the accommodations required under the May 27, 2009 Accommodation Plan during the first semester of his sophomore year, roughly the entire period that the June 3, 2010 Interim Order had been in effect.

geometry, he was not provided with a second set of textbooks for use at home as was required under the plan. He testified that he took tests that had not been modified, (one of the accommodations listed on his 504 Plan), but rather was administered the same tests that all the other students took. Except on isolated occasions, he was not provided with examples of former test questions and high quality responses. The Petitioner argues that his son's uncontradicted testimony establishes that teachers ignored most of the provisions called for in the May 27, 2009 Section 504 Plan. This is substantial evidence that the district also violated the June 3, 2010 Interim Order.

### **Compliance with the January 14, 2011 Section 504 Plan:**

Similar testimony was submitted by the Petitioner with respect to the district's compliance with the revised Section 504 Plan developed on January 14, 2011. Student Doe testified that from January 14, 2011 through June 28, 2011 the district's compliance with his revised Plan was inconsistent at best. His son testified that he did not receive verbal prompts during testing, except occasionally in math and only at the end of the year when he had a substitute teacher. Teachers did not provide him with strategies such as mnemonics to aid his memory in studying for and taking tests. With the exception of the Biology teacher, none of his teachers ever provided him with an example of a project before he was required to complete the project. This was especially problematic with his successful completion of the "anchor project" for history and for completion of his sophomore paper in English. The only on-line textbook tutorial he received access to was in math. Conferences regarding expectations and ongoing progress on long-term projects and setting interim checkpoints for him simply did not take place.

An accommodation that seemed to create confusion among teachers and staff was Accommodation # 10. The Petitioner argues that teachers and staff do not understand that this accommodation requires not only advance notice of an upcoming test or quiz, but also an individualized "study packet" or "study guide" that includes the components of the test, information on the test format and suggestions on what to study from examples in Student Doe's homework, notes and class work. He also contends that a "study packet" is not sufficient if his son receives the same packet of test preparation materials that is distributed to the entire class. According to his interpretation of what this provision requires, with the exception of the Geometry teacher, it was not followed by the rest of the teachers.

Student Doe testified that his position in not a single one of his classes was changed after his January 14, 2011 Section 504 Plan was implemented. The Petitioner argues that this testimony provides clear evidence that the accommodation requiring that his son's placement in the classroom minimize socialization or other distractions was simply ignored. He argues that the testimony as a whole establishes that for the most part there are more instances of non-compliance than compliance with his son's Section 504 Plan.

### **Adequacy of the January 14, 2011 Section 504 Plan:**

The Petitioner argues that the testimony of Dr. Whipple establishes that the Section 504 Plan developed on January 14, 2011 does not include all of the accommodations that are necessary to provide his son with a free appropriate public education. In her testimony, Dr. Whipple described

two additional test-taking accommodations. The specific language for both of these additional accommodations was contained in the email that the Petitioner sent to the 504 team on January 30, 2011. Dr. Whipple confirmed in her testimony that Accommodation # 12 (allowing Student Doe to use appropriate memory supports during testing) and Accommodation # 13 (for content-intensive tests, considering matching or multiple choice tests rather than essay-type tests, and when essay tests are used, providing him with a word bank relevant to the topic at hand) are necessary accommodations. She based her testimony on her knowledge of Student Doe and the testing she had administered to him.

There were other suggestions Dr. Whipple had made to add or change language in the Section 504 Plan to add clarity and to make certain accommodations more specific. The suggested revisions also place less responsibility on Student Doe and more on his teachers. For example, instead of simply having him show his class notes to teachers for a determination to be made of whether he is correctly and adequately capturing information from lectures, Dr. Whipple proposes “When available, provide (Doe) with an outline of the teacher lecture in advance of the lecture...When available, provide (Doe) copies of a competent peer’s notes... (Doe) will show copies of the notes he takes in class to determine if he is correctly and adequately capturing information from lectures”.

These and other revisions to the Plan as outlined in Petitioner’s Exhibit 3 are absolutely necessary, the Petitioner argues, in order for his son to receive a free appropriate public education from the North Kingstown School Department.

#### **Absence of a local grievance process to hear 504 disputes within the district:**

The Petitioner submits that the evidence shows that the North Kingstown School Department does not have a local grievance procedure, as is required by regulations implementing Section 504 of the Rehabilitation Act of 1973. He points out that on March 5, 2011 he emailed the Superintendent and members of the North Kingstown School Committee to seek their involvement in working out a resolution of the issues he raised at that time. His communication to these local officials requested a meeting so that “these final issues (could be resolved) amongst ourselves very quickly”. Instead of being provided with a grievance procedure at the local level, he was referred to RIDE for another hearing or to the Office of Civil Rights for the filing of a complaint. (Petitioner’s Exhibit 11)

About two months later, he again sought to meet with members of the School Committee to address outstanding issues and emailed Superintendent Thornton on May 6, 2011 with a request to “sit down and try to reach an agreement amongst ourselves” rather than proceed with what he described as a “painful process” before the Office of Civil Rights. Again, the district’s response was to deny him a meeting with members of the School Committee and to refer him to the OCR process. (Petitioner’s Ex.12)

Further evidence of the failure of the district to have in place a local grievance process for resolving 504 issues is found in the communication from Superintendent Thornton sent to the Petitioner on April 5, 2010 when the Petitioner requested that the Superintendent and members of the School Committee intervene to resolve the impasse that had been reached with school officials at that time. Dr. Thornton responded that the process was to contact RIDE if he wanted to “pursue

this further". Thus, on two separate occasions when he sought to utilize a local grievance process, school department officials deflected the dispute to a different process at the state and federal level. This constitutes evidence that the district has no local process to resolve 504 disputes.

Several remedies are requested for the violation of his son's right to a free appropriate public education under Section 504 of the Rehabilitation Act of 1973. The Petitioner requests that RIDE cite the district for violations of federal law, order revisions to his current 504 Plan and order the district to provide compensatory "make up" services and tutoring for the final two years of Student Doe's high school career.

### **North Kingstown School Committee:**

At the outset, counsel for the district points out that the Petitioner has the burden of proof on each and every one of the allegations that he makes against the North Kingstown School Department.

The district argues that testimony of the 504 Coordinator at North Kingstown High School establishes that all of Student Doe's teachers were notified by email that there was a "stay put" order in place and copies of the May 27, 2009 Section 504 Plan were given to all of his teachers at the beginning of the 2010-2011 school year. When the 504 team met and developed a revised 504 Plan on January 14, 2011, she made sure that the revised plan was placed in every one of his teachers' mailbox. During the "stay put" period, and during the entire period after the implementation of the January 14, 2011 Plan, she does not recall receiving a single complaint that the plans were not being followed- from either Student Doe or his father.

The Petitioner's only evidence that the Plans were not followed consists of the testimony of his son. Under cross examination, Student Doe testified describing the many occasions on which his teachers met with him after school. They talked to him "about everything," giving him advance notice of a test or quiz, specific and helpful information about what he should study, often providing him with study materials. They frequently reminded him to initiate tasks or study for tests. Although Student Doe testified that he never received the accommodation requiring that he receive verbal prompts to assist him in initiating tasks and tests, on cross he indicated confusion as to what a prompt actually is. The evidence demonstrates that whenever Student Doe requested extra time to complete a test or quiz, he received extra time pursuant to his 504 Plan. He testified that all of his teachers helped him after school with projects, made corrections to his notes and made suggestions if he forgot to put something in his planner. His testimony was often contradictory, and he was unsure of what the terminology in his 504 Plan meant. All in all, there was insufficient evidence that both 504 Plans were not followed.

The district's position is that Dr. Whipple's testimony does not establish that his revised Plan is inadequate to meet his needs. Dr. Whipple testified that Student Doe is an average student, with average intelligence. A 504 Plan is not for the purpose of giving recipient students grades in the nineties, as opposed to grades in the seventies. Dr. Whipple testified that she often places the decision as to whether a specific accommodation is necessary on the teacher, who knows the student best. She thought the additional accommodations she had suggested would be "helpful".



The expert who appeared on behalf of North Kingstown reviewed Dr. Whipple's April 13, 2009 evaluation and testified that she saw no evidence in the report that Student Doe had memory issues. She therefore testified that she did not agree with the changes to the 504 Plan that had been suggested by Dr. Whipple. The high school's 504 Coordinator also testified that she obtained input from all of Student Doe's teachers in drafting the 504 Plan and carefully considered the additional accommodations that were requested by the Petitioner after the team had met on January 14, 2011. She did make some changes in the 504 Plan as a result of the Petitioner's request, but did not incorporate all of the requested changes. There is simply insufficient evidence that the plan is inadequate to address Student Doe's needs.

Finally, there is no evidence that the North Kingstown School Department lacks a local grievance procedure to address 504 issues. If a parent disputes an IEP or a 504 Plan that has been developed by the district, their dispute goes to a due process hearing.

The history in this specific case is of a long-running dispute in which the Petitioner has been objecting to his son's Plan and raising various 504 issues for more than a year. When the issues could not be easily resolved, the district 504 Coordinator, Rachel Santa, became involved. When the dispute persisted, the district brought in a mediator. The next step is a RIDE-level hearing or Office of Civil Rights complaint. It is not appropriate, or required, that the Superintendent and members of the School Committee intervene or become involved in 504 or IEP disputes. State law, particularly R.I.G.L. 42-87-5 (c), clearly gives RIDE the authority to hear complaints regarding 504 issues. Therefore, this matter is properly before the Commissioner for a decision.

For all of the above-stated reasons, the Petitioner's complaint should be denied.

### **DECISION**

#### **Adequacy of Student Doe's current 504 Plan:**

Some of the history in this case is set forth in the Commissioner's December 23, 2010 decision. It is clear from the prior decision, as well as from the record in this case, that the parties have major differences as to what is required to provide Student Doe, a "handicapped person," with a free appropriate public education. Section 104.33 of the regulations implementing Section 504 of the Rehabilitation Act of 1973 requires that Student Doe receive:

regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

A 504 team was convened by the North Kingstown School Department on January 14, 2011 to review Student Doe's 504 Plan. The documentation from this meeting indicates that the April 2009 report was the only formal evaluation of Student Doe that the team considered at the meeting. (Petitioner's Ex. 2 and 15). Yet, the Section 504 Plan that was developed at that meeting did not take into account the findings of the evaluation that related to his memory issues and his problem

retaining information<sup>8</sup>. Although these issues were later added to the document as “areas of concern” (at the Petitioner’s request on January 30, 2011) the district’s contention that the 504 Plan is adequate is based on an inconsistent factual premise. Stated another way, North Kingstown now takes the position that Student Doe does not have memory issues that need to be addressed in his 504 Plan.

The district presented Dr. Patricia Pezzullo as an expert witness to explain why changes (especially additional accommodations) to this 504 Plan were not necessary. She testified that she had done a thorough review of the April 2009 evaluation (Tr. p. 157) and that the evaluation provided no evidence of memory issues. She also testified that the data do not support a finding that Student Doe has memory issues. (Tr. p. 159-160) However, the findings of his evaluator (Dr. Whipple) as described in the written report (S.C. Ex. A) were clear that Student Doe has a disability that causes him to have a weakness in memory and difficulty in retaining information. Dr. Whipple confirmed these findings and conclusions in her testimony. In light of her findings and the fact that the Section 504 team discussed memory issues and added “memory and retention of information” to the list of concerns to be addressed by his 504 Plan on February 8, 2011 (Petitioner’s Ex.14 and 15), we find as a fact that Student Doe’s disability does in fact cause him to have memory issues and a problem retaining information. The district’s contention that he does not have these issues or needs is not supported by the preponderance of evidence in this case. Thus the factual underpinning to the contention that his current Plan is adequate is not supported in this record. We find that the Plan developed on January 14, 2011 does not effectively address these issues to the point where the “playing field is leveled” for Student Doe and the revisions and additional accommodations suggested by Dr. Whipple should be incorporated into his 504 Plan.

It should also be noted that Dr. Whipple’s 2009 evaluation made several recommendations with respect to how Student Doe’s memory issues could be addressed using study strategies.<sup>9</sup> She suggests teaching Student Doe study skills such as how to use his planner to organize and plan his study time, how to reorganize his notes prior to studying, how to use graphic organizers and an organizational template to re-write and consolidate all information pertaining to a given concept before trying to memorize it. She suggests that he be given instruction in underlining and outlining techniques and taught how to use index cards to review and memorize information. Dr. Whipple emphasizes teaching this student simple and basic strategies to aid in recall. It is interesting to note that in her testimony, the district’s expert Dr. Pezzullo also discussed an approach whereby Student Doe would work, at least initially, in concert with a teacher to develop strategies to aid his memory so that he would eventually learn how to develop these tools and techniques on his own.<sup>10</sup>

It is these same study skills and strategies in aiding his memory that the Commissioner urged the parties to “revisit” in the December 23, 2010 decision. The record in this case confirms that instructing Student Doe how to organize information and to study will provide him with skills so that he can better retain information covered in his courses. Both Dr. Whipple and the district’s expert share the opinion that he must develop these study skills in order to have academic success.

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<sup>8</sup> Section 504 Regulations require that the Plan developed take into account evaluation findings. See 34 CFR § 104.35.

<sup>9</sup> Her recommendations on how to address Student Doe’s memory issues are contained in pages 7-10 of her report, S.C. Ex. A.

<sup>10</sup> See her testimony at pages 158-160.

If Student Doe can work on these study skills and strategies in school, perhaps the extensive time that he typically spends at home studying with his father's assistance can be reduced.

The 504 Plan developed on January 14, 2011 lacks sufficient clarity and appears to place much of the responsibility for ensuring several of the accommodations on Student Doe. The revisions suggested by Dr. Whipple that are described in Petitioner's Exhibit 3 address most of these issues. Given Student Doe's memory issues, it is important to eliminate the uncertainty of an accommodation that is triggered when the student is "encouraged" to use a strategy or "reminded" to initiate conferences with his teachers. To be effective, there must be more certainty that the accommodation will actually happen. Given Student Doe's memory issues, the 504 Plan should specify that the student is to be provided with strategies and actually have the necessary conferences with his teachers. In light of the nature and number of accommodations in his plan, there may be a need for coordination of the plan by a member of the staff at North Kingstown High School.

There is also evidence of confusion as to whether Accommodation # 10 requires that Student Doe be given a written "study packet" to take home in advance of a test and whether materials that are provided to him must be different from materials provided to the rest of his classmates. As previously stated it is our conclusion based on this record that this student needs instruction and assistance while at school in developing study skills and techniques, and not just a study packet to take home before a test or quiz. Accommodation # 10 does not clearly state that Student Doe should receive a packet of written materials, and it is unclear as to what should be included in any study packet provided to him. Many of his teachers expressed confusion on this as well. This should be clarified when the 504 Plan is revised. Depending on what materials are in the packet, it may or may not be different from what the rest of his classmates receive or have access to in preparation for a test. The point is that the material in the packet should meet Student Doe's identified needs. His need for study materials at home may change if more is accomplished in school in the way of organizing notes and summarizing and outlining information that is to be covered on a test.

The parties do not have a working relationship that enables them to revisit the plan without the assistance of a special visitor. A special visitor will be designated by the Commissioner to work with the parties as a mediator and as a 504 consultant to develop a revised Plan as soon as possible, but not later than October 24, 2011. The cost of the special visitor, if that person is not a RIDE employee, will be borne by the North Kingstown School Department. The Commissioner will retain jurisdiction and reconvene the hearing should either or both of the parties have objection to the final plan proposed by the mediator/504 consultant.<sup>11</sup>

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<sup>11</sup> We also anticipate that the parties have reviewed or will review the new evaluation submitted by the Petitioner to the district at the June 28, 2011 hearing.

### **Compliance with the June 3, 2010 Interim Order:**

There is some evidence that the North Kingstown School Department failed to provide all of the accommodations required by the May 27, 2009 Section 504 Plan and thereby failed to comply with the June 3, 2010 Interim Order issued by the Commissioner. During the period in which any failures could have been effectively remedied, we find that the Petitioner's actions effectively waived his right to any remedy in this proceeding. Counsel for the district emailed the Petitioner with a request that he "be specific as to how your feel it (the May 27, 2009 504 Plan) is not being followed". (See email of November 23, 2010, part of Petitioner's Ex. 11) If the Petitioner had provided "specifics," counsel for the district could have taken any steps necessary to ensure that her client was complying with the Interim Order by following all of the provisions of the 504 Plan then in effect. The Petitioner did not provide specifics in response to her November 23, 2010 request, as indicated in our findings of fact. The Petitioner's failure to do so, together with the fact that he took no steps to enforce the Interim Order in court as he was clearly entitled to do if North Kingstown was in fact not complying with it<sup>12</sup> constitute a waiver of his right to assert that any of these violations should be remedied by the Commissioner in this proceeding at this point in time.

### **Compliance with the provisions of the January 14, 2011 Section 504 Plan:**

With respect to the district's compliance with the January 14, 2011 Section 504 Plan, the Petitioner failed to meet his burden of proof with respect to his claim that his son's teachers did not consistently follow the plan. Contrary to the claim that many of the accommodations were not provided, Student Doe testified he did in fact receive these accommodations. The wording of some of the accommodations is unclear, such that compliance is determined by whether or not Student Doe "was encouraged to use strategies" (Accommodation #2) and whether he "was reminded to initiate conferences" (Accommodation #4), not by whether the strategies were provided to him or if the conferences with teachers actually took place. Much of Student Doe's testimony verified that he in fact received encouragement, reminders and extra help from his teachers after school. Student Doe's testimony that his seating in class remained the same even after implementation of the revised 504 Plan is insufficient to prove that the district did not comply with Accommodation # 11 (requiring that the district "place him in a classroom location that minimizes socialization or other distractions"). There is an inference to be drawn that his seating was not changed in compliance with his 504 Plan, but just as possible is the inference that his teachers had already positioned him in the classroom so as to minimize distractions prior to January 14, 2011.

### **Failure to have a local grievance procedure:**

The Petitioner alleges that the North Kingstown School Department has no local grievance procedure in place to address 504 disputes. He submits that at two different times when he requested a meeting at the local level to present his grievances, he was referred to state and federal agencies and told to seek his remedy through a hearing at RIDE or by filing a complaint with the federal Office of Civil Rights. For its part, North Kingstown argues that "If a parent disputes an IEP or a 504 their dispute goes to a due process hearing" (District's memorandum at page 3). However, North Kingstown goes on to point out that in the Petitioner's case, there was an extensive process utilized for resolution of his 504 issues at the local level prior to directing the Petitioner to RIDE or

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<sup>12</sup> Interim Orders are enforceable in the Superior Court pursuant to R.I.G.L. 16-39-3.2.

the Office of Civil Rights on April 5, 2010 (Petitioner's Ex. 18). Issues concerning the adequacy and implementation of Student Doe's May 27, 2009 Section 504 Plan was initially referred to the district's 504 Coordinator, Rachel Santa. When her efforts were unsuccessful, a mediator (paid for by the district) continued to attempt resolution of the dispute for a period of three (3) months. At the point when it was clear that a resolution by the district-appointed mediator could not be effectuated, the Petitioner requested that the North Kingstown School Committee intervene. It was at this point that then-Superintendent Thornton notified the Petitioner that if he wanted to pursue the matter further, he could contact RIDE.<sup>13</sup>

More recently, in early March of 2011, when the Petitioner asserted that the revised 504 Plan was inadequate and was not being followed, it is evident that he was not offered the same "grievance procedure" that had been utilized to no avail during the prior school year. It is clear that district officials considered his claims, which at that point included issues with respect to compliance with the June 3, 2010 Interim Order, part and parcel of a single ongoing dispute that clearly could have no resolution through an informal grievance process. On April 13, 2011 counsel for the district appropriately referred the Petitioner directly to RIDE or the Office of Civil Rights for the filing of a complaint.

In summary, although there is no direct evidence or description of what North Kingstown's local grievance procedure is, there is evidence that a local process for resolving 504 disputes exists and that it was utilized to attempt resolution of the Petitioner's dispute prior to his referral to RIDE and OCR in April of 2010. We find that it was not required or appropriate to refer the 504 issues the Petitioner presents in this second appeal to a local grievance process since the parties have been involved in litigation for over a year and their dispute is more in the nature of a single, protracted dispute. The Petitioner has not proven by a preponderance of the evidence that North Kingstown lacks a local grievance procedure for resolving 504 disputes that is required by 34 CFR 104.7. An extended local grievance process was utilized in an attempt to resolve the 504 dispute he had with the North Kingstown School Department at its inception in early 2010.

For the foregoing reasons, the appeal is sustained in part and denied in part. This decision is entered as both a final decision and Interim Order in the event either or both of the parties appeal this decision.

For the Commissioner,

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Kathleen S. Murray

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October 4, 2011

Date

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Deborah A. Gist

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<sup>13</sup> Superintendent Thornton provided the Petitioner with contact information for RIDE's legal office in his email to the Petitioner on April 5, 2010. See Petitioner's Ex. 18.